Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments	**GN Docket No. 17-142**

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO
ON THE NOTICE OF PROPOSED RULEMAKING

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney
Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
Facsimile: (415) 554-4763
E-Mail: william.sanders@sfcityatty.org

August 30, 2019

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF COMMENTS

The City and County of San Francisco ("City" or "San Francisco") submits these comments on the *Notice of Proposed Rulemaking for Improving Competitive Broadband Access to Multiple Tenant Environments*, 84 Fed. Reg. 37,219 (July 31, 2019) ("*NPRM*"). The Federal Communications Commission ("FCC" or "Commission") issued this *NPRM* to "continue [its] efforts to ensure that all Americans have access to high-speed broadband, regardless of the type of housing in which they reside or the level or income they earn, and regardless of where they work."[1] San Francisco fully supports these laudable goals.

In many multiple tenant environments ("MTEs") in San Francisco and other parts of the country, residents continue to have no option other than the single provider chosen by the property owners. MTE owners routinely deny access to other providers offering competitive services, even when those providers are responding to requests for service from existing residents.

San Francisco appreciates the Commission's efforts in this proceeding to seek ways to enhance competition in the provision of communications services in MTEs. The first step the Commission should take is to strengthen its prohibition of anti-competitive agreements, such as revenue sharing agreements and sale-and-leaseback and exclusive wiring arrangements. These types of agreements harm consumers and new entrants into the market. In addition, the Commission should recognize that state and local governments can use their police powers to adopt laws that complement the Commission's efforts. The Commission should continue to work with state and local governments to make sure that occupants of MTEs can choose their communications services provider, regardless of the types of services they are seeking to purchase.

[1] *NPRM*, 84 Fed. Reg. at 37,220, ¶ 1.

II. COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

A. THE COMMISSION SHOULD PROHIBIT REVENUE SHARING AGREEMENTS BECAUSE THEY HARM COMPETITION AND DISCOURAGE BROADBAND DEPLOYMENT

The Commission has asked for comments on the "impact revenue sharing agreements have on competition and deployment within MTEs."[2] In San Francisco's experience, these agreements harm consumers, while benefiting only a few providers and building owners.

For years, communications providers and building owners have entered into revenue sharing agreements in which a building owner will require a provider to pay an entrance fee or share a portion of the revenues it receives from selling communications services in an MTE with the building owner. In some instances, a building owner will require a provider to enter into such an agreement simply to enter the property to provide services:

> [C]ompetitive ISPs are seeing routine demands by developers and landlords for revenue sharing agreements and "door fees": many Real Estate Investment Trusts (REITs) won't let you in the door unless you agree to share revenue with them. There's a whole layer of intermediaries out there who have developers or REITs as clients and aggressively market "opportunities" for buildings to make additional revenue streams stemming from de facto exclusive Internet access agreements, and manage and drive arrangements in the residential real estate market. Completely unprincipled and potentially unlimited demands for paybacks are the result.[3]

These "door fees" are often structured as a per-unit fee based on the number of units in an MTE, rather than each unit served by a provider. Each new provider must pay the fee just for the privilege of providing services within an MTE and compete with the existing provider. In other MTEs, building owners can receive as much as ten percent of the provider's revenues if certain penetration targets are met.[4] These agreements present a formidable barrier to entry for new entrants as they seek market share.

---

[2] *NPRM*, 84 Fed. Reg. at 37,220, ¶ 4.
[3] Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers* (June 27, 2016) ("Crawford"); available at https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/; *see also* INCOMPAS comments filed in *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 2017 WL 2790732 (2017) ("*NOI*"), at 9 (filed July 24, 2017) (referring to "graduated revenue sharing agreements" as a "pernicious" practice that has a "negative effect on competition").
[4] *See* Crawford, *supra*.

An association of internet providers told the Commission in comments filed earlier in this proceeding that revenue sharing agreements provide strong disincentives for building owners to allow competitors to enter their properties:

> [T]he use of revenue sharing arrangements has created an expectation on the part of landlords, such that competitive broadband and video providers that are unable or unwilling to participate in revenue sharing schemes are denied access to MDUs. Landlords have no incentive to grant access to competitive providers when any subscriber gained by that provider means reduced income to the landlord. Those types of arrangements create perverse incentives to bar competition and keep prices high, and the predictable (if not intended) result is that MDU residents are deprived of competitive options. Moreover, residents are likely to face higher prices for the service that is available, as landlords are rewarded when revenues per unit increase. On top of it all, residents usually have no idea that their landlord receives a kickback from their communications provider. They are simply told that competitive services are not available in their building.[5]

More importantly, these agreements have "no upside for consumers."[6] They "discourage new entrants from serving customers. A building owner or landlord who demands an access fee or locks out competition harms tenants."[7]

The Commission cites as a potential reason for continuing to allow these types of agreements arguments that some small cable and broadband providers will be "unable to compete in the MTE market" without "revenue sharing agreements and other similar agreements."[8] Entities filing comments with the Commission that support revenue sharing agreements contend that, absent incentives like these, MTE owners could be discouraged from making investments in broadband infrastructure.[9] Nonetheless, that some market participants might benefit from barriers to entry imposed on potential competitors is not a compelling reason to allow for them.

---

[5] INCOMPAS *NOI* comments at 10.
[6] INCOMPAS *NOI* comments at 11.
[7] Comments of the Institute for Local Self-Reliance, Public Knowledge, and Next Century Cities filed in the *Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code* ("*MBC Petition*"), MB Docket No. 17-91, at 2 (filed May 18, 2017).
[8] *NPRM*, 84 Fed. Reg. at 37,220, ¶ 4.
[9] See NCTA *NOI* reply comments at 2-4 (filed August 22, 2017).

Furthermore, these arguments do not seem to reflect the realities of the marketplace particularly in large cities like San Francisco that have multiple internet service providers. Any person in San Francisco seeking to rent an apartment in an MTE, particularly a newer MTE, would expect that the building has inside wiring that is accessible to more than one provider. It would seem, therefore, that building owners are incentivized to make sure that their tenants can purchase those services from multiple providers. In fact, this is what one owner of multiple MTEs in San Francisco told the Commission.

> AvalonBay[10] is highly focused on customer service and ensuring our residents receive services they need and desire, including broadband services. . . . Consistent with this strong customer focus, AvalonBay endeavors to offer residents a choice of telecom providers at our communities, but the number of choices available are typically limited by space constraints within telecom closets and structured wiring cabinets. We strive to offer multiple, high-quality telecom providers at our communities, and all of our communities in San Francisco have at least two, and in some cases three, providers.[11]

The Commission's failure to prohibit these types of agreements is harming the millions of people in the United State who reside in MTEs, while benefiting a handful of providers who rely on their monopoly statuses to earn a profit—and allowing property owners to benefit from revenue sharing agreements. The flat fee per-unit structure of these door fees mean that each succeeding entrant to a building will face a formidable barrier to offering a choice of service to residents. Competitive providers have no incentive to enter markets if they will be denied the ability to fairly compete for customers in MTEs. In many locations, it is simply uneconomic to construct a broadband network where the provider cannot serve MTEs. San Francisco recommends that the Commission take strong action to end this practice that harms consumers.

[10] AvalonBay is a real estate investment trust that directly or indirectly owns nearly 300 apartment communities, containing 82,533 apartments in ten states and the District of Columbia, including ten communities in San Francisco with a total of 2,359 apartments. AvalonBay comments in support of the *MBC Petition*, at 1 (filed May 18, 2017).
[11] *Id*. at 2.

B. SALE-AND-LEASEBACK ARRANGEMENTS AND EXCLUSIVE WIRING ARRANGEMENTS HARM CONSUMERS

1. The Commission Should Find that its Existing Cable Inside Wiring Regulations Prohibit Sale-and-Leaseback and Exclusive Wiring Arrangements

In 2007, the Commission prohibited cable providers from entering into agreements that granted them the exclusive right to provide services to MTEs:[12]

> The record herein reveals that exclusivity clauses are widespread in agreements between MVPDs and MDU owners, and that the overwhelming majority of them grant exclusive access to incumbent cable operators. Exclusivity clauses between MVPDs and MDU owners have the clear effect of barring new entry into MDUs by wire-based MVPDs. The evidence before us shows that this effect occurs on a large scale.[13]

Undeterred by this ruling, the cable providers simply found a way to obtain the benefits of exclusive access agreements without violating the Commission's rules. As the Commission notes, after 2007 cable providers and MTE owners started entering into sale-and-leaseback arrangements under which the providers install wiring in an MTE, sell the wiring to the MTE owner, and then lease back the wiring on an exclusive basis.[14] Alternatively, the providers and MTE owners entered into exclusive wiring arrangements. Under these arrangements, providers obtain the exclusive right to use the wiring in the MTE.[15]

In 2007, the Commission did not consider the impact sale-and-leaseback arrangements would have on its goal to increase competition—which makes sense because those arrangements likely did not exist at the time. The Commission did, however, consider whether to prohibit exclusive wiring arrangements—and decided not to.[16]

---

[12] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235, 20251, ¶ 30 (2007), review denied and decision affirmed, *Nat'l Cable & Tel. Assn. v. F.C.C.*, 567 F.3d 659 (D.C. Cir. 2009) ("*2007 Exclusivity Order*"); 47 C.F.R. § 76.2000.

[13] *2007 Exclusivity Order*, 22 FCC Rcd. at 20240, ¶ 10 (footnotes omitted).

[14] See *NPRM*, 84 Fed. Reg. at 37221-37222, ¶¶ 11-12.

[15] *Id*. at 37222, ¶ 13.

[16] *Id.*, citing *2007 Exclusivity Order*, 22 FCC Rcd. at 20237, ¶ 1 and fn. 2.

The Commission should reconsider that decision now. Sale-and-leaseback and exclusive wiring arrangements have the same impact: they deny competitors access to the inside wiring. Both require a competing provider to install its own wiring in the MTE in order to provide service.[17] These arrangements "are in effect de facto exclusive [right-of-entry] agreements that confer "monopoly status on a selected provider include granting . . . exclusive use of existing cable inside wiring owned by the property owner."[18]

In the *NPRM*, the Commission asks whether sale-and-leaseback arrangements violate the Commission's existing cable inside wiring rules.[19] The simple answer to this question is yes. The Commission's existing regulations require cable operators to "take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point."[20] Sale-and-leaseback and exclusive wiring arrangements are antithetical to the Commission's regulation. The very purpose of those arrangements is to impede an alternative service provider's access to the home wiring. As the Fiber Broadband Association succinctly states in its comments filed in the *NOI*:

> By putting formal title to inside wiring in the hands of the property owner, while giving incumbents perpetual control or exclusive use rights (whether exercised or not), these arrangements amount to an end run around the Commission's rules designed to facilitate competitive access to provider-owned wiring in the event of termination of the incumbent provider's service.[21]

---

[17] Interestingly, these are exactly the types of arrangements that San Francisco was concerned about when it adopted Article 52 of the Police Code and required property owners to grant competitive providers access to "existing wiring" which Article 52 defined to mean "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively" to the extent they were owned by the MTE owner. S.F. Police Code, § 5200.

[18] Carl Kandutsch, *MDU Right of Entry Agreement - Bulk Cable Agreement - Door Fee - Revenue Share* (March 3, 2012) available at https://www.kandutsch.com/glossary/mdu-right-of-entry-agreement-bulk-cable-agreement-door-fee-revenue-share.

[19] *NPRM*, 84 Fed. Reg. at 37,222, ¶ 12; referring to 47 C.F.R. § 76.802(j).

[20] 47 C.F.R. § 76.802(j)

[21] Fiber Broadband Association *NOI* comments, at 12 (filed July 24, 2017); *citing* Carl Kandutsch Law Office, Exclusive *Use of Inside Wiring Clauses in Cable ROE Agreements* (May 2, 2014), available at http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements ("[B]y specifying that the Internal Wiring belongs to the property owner, the agreement evades the FCC's Inside Wiring Rules insofar as those rules apply only to inside wiring that is owned by the incumbent cable operator."); and 47 C.F.R. § 76.802.

The Commission should find that its existing inside wire regulations are a complete bar to sale-and-leaseback and exclusive wiring arrangements and should be disallowed. If the Commission's goal is to increase competition, allowing for these types of arrangements will have the opposite effect.

2. Alternatively, the Commission Should Adopt New Regulations Prohibiting Sale-and-Leaseback and Exclusive Wiring Arrangements

The Commission also asks whether it should "revisit" its decision regarding exclusive wiring arrangements.[22] The answer to that question is yes, at least to clarify any ambiguities in the Commission's existing regulations.

The Commission found in 2007 that exclusive wiring arrangements did not harm consumers—at least to the same extent that exclusive access agreements did:

> In the *2007 Exclusive Service Contracts Order*, the Commission drew a distinction between exclusive access agreements, which it prohibited because they completely denied new entrants access to buildings, and exclusive wiring arrangements, "which do not absolutely deny new entrants access to [residential MTEs] and thus do not cause the harms to consumers" caused by exclusive access agreements.[23]

Since 2007, when the Commission prohibited exclusive access agreements, MTE owners and cable providers have increasingly relied on exclusive wiring agreements to serve the same purpose:

> But the Commission has been completely out-maneuvered by the incumbents. Sure, a landlord can't enter into an exclusive granting just one ISP the right to provide Internet access service to an MDU, but a landlord can refuse to sign agreements with Big Company X, in exchange for payments labeled in any one of a zillion ways. Exclusivity by any other name still feels just as abusive.[24]

But, it is not only the large cable and telecommunications providers that benefit from and support the Commission's continued indifference to exclusive wiring agreements. Rather, the evidence in this proceeding is that exclusive wiring agreements are also the business model

[22] *NPRM,* 84 Fed. Reg. at 37,222, ¶ 26.
[23] *Id.*, quoting *2007 Exclusivity Order*, 22 FCC Rcd. at 20237, ¶ 1 and fn. 2.
[24] Crawford, *supra*.

of private cable operators[25] ("PCOs").[26] As the Multifamily Broadband Council[27] ("MBC") argued in its petition to preempt Article 52 of San Francisco's Police Code, "[w]ithout the ability to secure the exclusive right to use designated wiring necessary for the delivery of the provider's services, smaller, independent providers, such as MBC's Member Companies, will not be able to demonstrate a likely revenue stream sufficient to obtain the third-party financing necessary to extend service to a building under any of the scenarios discussed above."[28] These arguments were echoed by other PCOs who filed comments in the *MBC Petition* in which they claimed that, "where a PCO has successfully negotiated an agreement for exclusive access to the property owner's wiring, Article 52 nullifies that arrangement by mandating that the property owner allow all comers to share his or her wiring."[29]

These arrangements are inherently anti-competitive due to the high cost a competitive provider would have to incur just to obtain the opportunity to compete for the incumbent's existing customers. As INCOMPAS states in its comments filed in the *NOI*:

> Exclusive wiring agreements foreclose competition without any benefit to consumers. Though some landlords and service providers argue that exclusive wiring arrangements are somehow tied to providers' ability to provide high-quality service, this is a false nexus and the Commission should reject these arguments. There is no legitimate reason why good service presupposes exclusive wiring. . . .[30]

---

[25] Private cable operators or PCOs are independent company that provide services in MTEs, gated communities, hotels, and other small businesses. They often use bulk-buying arrangements. PCO services are generally provided over satellites, rather than fiber. *See* https://en.wikipedia.org/wiki/Private_cable_operator.

[26] *See* http://bluetopsolutions.com/index.php?option=com_content&view=article&id=49&Itemid=58 (to obtain service from Blue Top the "property owner must willing to enter into a bulk or exclusive contract for video service or allow exclusive access to the existing coaxial cable wiring, which must be owned by the property owner").

[27] The Multifamily Broadband Council states that it represents "non-franchised, independent companies and their vendors that provide broadband-related services to Multifamily communities." *See* https://www.mfbroadband.org/.

[28] *See* Declaration of Dan Terheggen at ¶ 8 (attached to *MBC Petition*).

[29] Declaration of Pat Hagan filed in *MBC Petition* (dated May 19, 2017); GigaMonster, LLC *MBC Petition* comments (same) (filed May 18, 2017); Spot On Networks, LLC *MBC Petition* comments (same) (filed May 18, 2017).

[30] INCOMPAS *NOI* comments at 15.

As INCOMPAS further notes, this harm from exclusive wiring arrangements is not only to the residents of those MTEs that have been denied the benefits of competition, it also inures to entire communities by disincentivizing competitors from even attempting to enter markets: "[T]he inability of competitive providers to gain that foothold and access subscriber-rich areas such as MDUs can harm the economic case to build high-speed broadband across entire communities."[31] If the Commission's goal is to promote broadband deployment, it should take the simple step of prohibiting all types of exclusive access agreements including sale-and-leaseback and exclusive wiring arrangements.

The Commission should take this opportunity to enact new regulations that prohibit all communications providers from enforcing or entering into any exclusive wiring or sale-and-leaseback arrangements in residential MTEs. By ensuring that MTE residents are able to purchase services from the providers of their choice, the Commission will pave the way for competitors to construct the facilities they need to enter new markets. More providers means better services and lower prices for consumers.

C. SAN FRANCISCO'S MANDATORY ACCESS LAW PROMOTES COMPETITION

The Commission is also seeking comments on "examples of state or local government programs that have succeeded in improving competition, deployment, and access to broadband in MTE buildings."[32] San Francisco shows below that its mandatory access statute has done just that.

As discussed above, efforts by this Commission to enhance competition among providers of communications services in MTEs have not been successful, at least in San Francisco. Communications providers have found ways to obtain exclusive access to MTEs without violating federal law. As a result, the San Francisco Board of Supervisors ("Board")

[31] INCOMPAS *NOI* comments at 5.
[32] *NPRM*, 84 Fed. Reg. at 37,222, ¶ 17.

determined that it was necessary to adopt a local law requiring owners of "multiple-occupancy buildings" to allow for competition.[33] As reported in the press:

> In an urban setting like San Francisco, eliminating the ability for landlords and ISPs to lock tenants into a take-it-or-leave-it scenario will create choice for a huge swath of people: "The reality in San Francisco is that tens of thousands of residents have been denied access to different internet service providers," said Mark Farrell of the San Francisco Board of Supervisors. "I fundamentally believe competition is a good thing that will ultimately drive prices down and improve internet access across all of San Francisco."[34]

The Board, therefore, adopted Article 52 of the Police Code. Article 52's title makes its purpose clear: "Occupant's Right to Choose a Communications Services Provider."[35] The Legislative Digest to Article 52 further shows the reasons the Board chose to act:

> Many occupants of residential and commercial multiple occupancy buildings are unable to choose between service providers because in some such buildings property owners allow only one provider to install the facilities and equipment necessary to provide services to occupants.
>
> State and federal regulatory agencies have adopted policies that promote competition among service providers, believing that this competition will benefit all consumers by incentivizing lower costs and better service. As the Federal Communications Commission ("FCC") has noted, "contractual agreements granting . . . exclusivity to cable operators harm competition and broadband deployment and . . . any benefits to consumers are outweighed by the harms of such [agreements]." (Citation.)[36]

---

[33] *See* Community Networks, *San Francisco Passes Ordinance: Tenants Have ISP Choice At Last* (Dec. 20, 2016) (available at https://muninetworks.org/content/san-francisco-passes-ordinance-tenants-have-isp-choice-last).

[34] *Id*.

[35] S.F. Police Code art. 52; *see also* S.F. Police Code § 5201 ("No Interference by Property Owner"); and S.F. Police Code § 5202 ("No Discrimination by Property Owner Against Occupant").

[36] A copy of the Legislative Digest is available at https://sfgov.legistar.com/View.ashx?M=F&ID=4737900&GUID=802633DB-E0BC-4499-B95A-D86B7253FABD.

Article 52 supports these goals by prohibiting a "property owner"[37] from interfering with the right of an occupant[38] of a "multiple occupancy building"[39] to choose a "communications services provider."[40] Under Article 52, a property owner "interferes with the occupant's choice of communications services provider" by "refusing to allow a communications services provider to install the facilities and equipment necessary to provide communications services or use any existing wiring[41] to provide communications services."[42]

Existing mandatory access statutes all require competitive providers to install their own facilities.[43] Article 52 expanded the mandatory access provision by requiring property owners to allow communications providers to access their existing wiring to provide service. As discussed below, as used in Article 52 existing wiring does not mean "in-use" wiring owned by a communications provider. Rather, it means excess capacity owned by the property owner.

1. Article 52 Requires a Collaborative Process between a Communications Provider and a Property Owner

In order to facilitate competition, Article 52 establishes a process for a communications services provider to seek access from a property owner.[44] There are three lynchpins to that process. First, the communications services provider must be "authorized to provide

---

[37] S.F. Police Code § 5200 defines "property owner" as "a person that owns a multiple occupancy building or controls or manages a multiple occupancy building on behalf of other persons."
[38] S.F. Police Code § 5200 defines "occupant" as a person "occupying a unit in a multiple occupancy building."
[39] S.F. Police Code § 5200 defines "multiple occupancy building" to include both residential and commercial properties. It also includes rental properties and cooperatively owned properties.
[40] S.F. Police Code § 5200 defines "communications services provider" as a person authorized by the California Public Utilities Commission to provide video or telecommunications services or is a "telephone corporation" as that term is defined in state law.
[41] S.F. Police Code § 5200 (emphasis added) defines "existing wiring" as "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively, except that those terms as used herein shall apply only to the home run wiring or cable home wiring *owned by a property owner*."
[42] S.F. Police Code § 5201(b).
[43] *See* http://www.imcc-online.org/blog/mandatory-access (stating that existing mandatory access statutes do "not say or imply that the cable operator has a legal right to access or utilize any wiring or other infrastructure that belongs to the MDU owner").
[44] *See* S.F. Police Code §§ 5204-5207.

communications services" in San Francisco and must have "received a request from one or more occupants" of the property.[45] Second, the communications provider must obtain the consent of the property owner to inspect the property or provide services.[46] Third, the communications provider must agree to pay "just and reasonable compensation" for accessing the property to provide services.[47]

A communications services provider can begin the process by sending a notice to a property owner requesting access to the property for an inspection.[48] The provider must also agree to comply with the property owner's "reasonable" health and safety conditions and to indemnify the property owner.[49]

If a provider wishes to provide service, it must send the property owner a notice of intent to provide service.[50] That notice must contain detailed information concerning how the the services to be provided and how the provider intends to serve the property.[51] The property owner may refuse the request for a number of reasons including: (i) "physical limitations" prevent the provider from installing its own facilities or using the existing wiring to provide service; (ii) granting access to the property would "have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property"; (iii) the provider will not agree to comply with the property owner's "reasonable" health and safety conditions; or (iv) the provider and the property owner cannot reach agreement on just and reasonable compensation.[52]

[45] S.F. Police Code §§ 5204(c)(1)(A)-(B), 5205(b)(1)(A)-(B).
[46] S.F. Police Code §§ 5204(c)(4), 5205(b)(4).
[47] S.F. Police Code § 5208.
[48] S.F. Police Code § 5204(c).
[49] S.F. Police Code § 5204(c)(1).
[50] S.F. Police Code § 5205.
[51] S.F. Police Code § 5205(b)(2)(B) (provider must include its "plans and specifications for any work to be performed and facilities and equipment and be installed on the property").
[52] S.F. Police Code § 5206(b).

2. Article 52 Does Not Require the Sharing of "In-Use" Wiring

The Commission's *Declaratory Ruling* in this *In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council,* 2019 WL 3065516 (July 12, 2019) ("*Declaratory Ruling*") preempted Article 52 in part based on its finding that Article 52 requires "building owners share their in-use wiring with communications services providers upon request."[53] By in-use wiring, the Commission appears to mean wiring that is already being used to provide service to a resident of an MTE.[54] In preempting Article 52 for this reason, the Commission erred. As San Francisco Mayor London Breed told the Commission in an *ex parte* filing dated July 2, 2019:

> A key element of Article 52 is a requirement that existing wiring owned by property owners be made available for use by other communications providers, if feasible. This sharing allows more than one communications provider to use wires on existing cables. The type of sharing contemplated by Article 52 is common practice in many MTEs and has led to healthy competition among communications providers. The Board of Supervisors adopted Article 52 to expand this practice to additional buildings where the property owner had not allowed multiple providers.
>
> On June 19, 2019, the FCC issued the Proposed Order for consideration at its July 10 meeting. Among other things, if adopted the Proposed Order would "preempt an outlier San Francisco ordinance to the extent that it requires the sharing of in-use wiring." As discussed above, this characterization of Article 52 is wrong. Article 52 does not require sharing of "in-use" wiring. The Proposed Order also suggests that this "forced sharing of in-use facilities . . . encourages providers to free ride on existing infrastructure rather than building their own." In making this statement, the Proposed Order ignores clear language in Article 52 that a "property owner is entitled to just and reasonable compensation from a communications services provider." While Article 52, therefore, lowers the cost for a competitive provider to obtain access to an MTE, it does not provide a so-called "free ride." Article 52 was developed with the active participation of AT&T, Comcast, the Chamber of Commerce, the Building Owners and Management Association, the Electronic Frontier Foundation, regional internet service providers, and others to achieve a balanced approach.

3. Article 52 Has Successfully Increased Competition in MTEs

Competitive providers in San Francisco universally support Article 52. The California Association of Competitive Telecommunications Companies ("CALTEL") participated in the

[53] *Declaratory Ruling*, 2019 WL 3065516 at *16, ¶ 42.
[54] *Id*.

process that led to the enactment of Article 52 and filed comments with the Commission in opposition to the *MBC Petition*. As CALTEL told the Commission, in mid-2016, Sonic (one of its members) starting encountering resistance from MTE owners as it tried to enter the San Francisco market. That all changed after San Francisco enacted Article 52:

> Since Article 52 went into effect in January, 2017 (30 days following passage and being signed by Mayor Lee), Sonic has been significantly more successful in gaining access to MDUs in San Francisco. As discussed in Mr. Jasper's declaration, having a written timeline and process has been particularly helpful in educating property owners about their rights and obligations under the ordinance, and has also helped Sonic gain access to MDUs where property owners had previously denied it.[55]

Similarly, Monkeybrains is an internet service provider based in San Francisco.[56] In an ex parte letter to the Commission dated July 3, 2019, Monkeybrains showed how Article 52 had helped to dismantle a barrier to entry and provide consumers with greater choice:

> Over 60% of the population in San Francisco are renters. Often when a tenant requests internet service in a large multiple-dwelling unit or multiple tenant environment building ("MTE"), the resident is deterred by its landlord and told they only have one or two choices of ISPs. When Monkeybrains tries to survey the site and provide options for service, property management will either stonewall us or refuse us entry on spurious grounds of aesthetics or interference when neither concern is relevant.
>
> Overall, Article 52 revolutionized the situation in favor of tenants and small ISPs like Monkeybrains. Before Article 52 passed in 2016, we had a 0% rate of servicing 40+ unit MTEs with active revenue share agreements with larger, established companies. Since Article 52 passed, we have a 60% rate of servicing 40+ unit MTEs with active revenue share agreements without invoking Article 52, and a 75 percent rate after invoking Article 52.
>
> As one example, a building where we invoked Article 52 and now have dozens of customers paying $35/month and receiving over 100 Mbps symmetrical speeds is also a 100% below-market-rate building in the Mission Bay neighborhood. Article 52 is already keeping money in the pockets of working-class San Francisco families and will continue to do so as long as it is utilized.

[55] CALTEL *MBC Petition* comments at 12 (filed May 18, 2017).
[56] *See* https://www.monkeybrains.net/signup.php?gclid=EAIaIQobChMIxLjRp7SF5AIVNRh9Ch3_2wmqEAAYASAAEgJTF_D_BwE

D. The Commission Cannot Rely on Section 253 or Section 332(c)(7) to Preempt State and Local Mandatory Access Laws

The Commission seeks comment on the question of whether there are "state and local regulations, or other state and local requirements, that deter broadband competition within MTEs because they 'prohibit or have the effect of prohibiting' the ability of any entity to provide telecommunications service."[57] The question the Commission left unasked, however, is whether the Commission has the authority under 47 U.S.C. section 253(a) (or 47 U.S.C. section 332(c)(7)[58]) to preempt state and local mandatory access laws. The answer to that question is no.

That section 253(a) has a limited scope is apparent from its text:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[59]
>
> **(b) State regulatory authority**
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

---

[57] *NPRM,* 84 Fed. Reg. 37,223, ¶ 18; quoting 47 U.S.C. § 253(a).

[58] 47 U.S.C. § 332(c)(7) contains the same "prohibit or have the effect of prohibiting" language. While the Commission does not mention section 332(c)(7) here, in a different proceeding the Commission construed the terms in both section 253 and 332(c)(7) to mean the same thing. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order*,* 33 FCC Rcd 9088, 9103, ¶¶ 35-36 (2018) ("*Infrastructure Order*"). The Commission found that this ruling "is consistent with the basic canon of statutory interpretation that identical words appearing in neighboring provisions of the same statute generally should be interpreted to have the same meaning." *Id*. at ¶ 36.

[59] The Communications Act defines the term "telecommunications service" to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Communications Act defines the term "telecommunications" to mean "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information sent or received." 45 U.S.C. § 153(43).

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The same can be said for section 332(c)(7):

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service[60] facilities.

The title of this Docket makes clear that the Commission is looking into ways to "Improve Broadband Access to Multiple Tenant Environments." Just last year in *In the Matter of Restoring Internet Freedom* the Commission reclassified broadband service as an "information service"[61] as that termed is defined in the Communications Act.[62] The Commission expressly rejected the ruling just two years earlier in *In the Matter of Protecting and Promoting the Open Internet,* in which the Commission had classified broadband service as a telecommunications service.[63] It would make no sense for the Commission to now find that sections 253 and/or 333(c)(7) apply to broadband services when those provisions apply only to telecommunications services.[64]

---

[60] The Communications Act defines the term "personal wireless service" to mean "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 46 U.S.C. § 332(c)(7)(C)(i).

[61] The Communications Act defines the term "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. 45 U.S.C. § 153(20).

[62] *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2017).

[63] *In the Matter of Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015), aff'd, *United States Telecom Assn. v. F.C.C.*, 825 F.3d 674 (D.C. Cir. 2016)

[64] See pages 10-12 of San Francisco's *NOI* comments filed on July 24, 2017 for a more detailed discussion of how the Commission could not rely on section 253 to preempt state and local

Nor can the Commission piggyback on the fact that some telecommunications providers use the same facilities to provide broadband services on a "commingled basis."[65] Traditional telecommunications services, as that term is defined in the Communications Act, are not involved here. Instead of traditional circuit switched voice services, most providers serving MTEs are offering Voice over Internet Protocol or VoIP services. Even the traditional telecommunications providers are moving their customers into VoIP services. According to the FCC's most recently published data, 54% or all wireline voice subscriptions are VoIP and 24% of incumbent local exchange carrier voice subscriptions are VoIP.[66] These numbers have undoubtedly increased since the Commission published this data in 2017.

But these are not the only impediments to the Commission relying on sections 253 and 332(c) to preempt state and local mandatory access laws. In the Telecommunications Act of 1996, Congress for the first time opened the door for competitive local exchange carriers ("CLECs") to provide local telephone service in competition with the incumbent local exchange carriers ("ILECs").[67] Congress enacted the provisions on which the Commission relies, sections 253 and 332(c)(7), as part of the Telecommunications Act of 1996. Congress intended section 253 to prohibit local regulations that would prevent these new CLECs from competing with the ILECs.[68] Section 253(a) "ended the States' longstanding practice of granting and maintaining local exchange monopolies."[69] To accomplish its purpose, in section 253(a) Congress

---

mandatory access laws like San Francisco's Article 52. Notably, the Commission did not cite section 253 in its *Declaratory Ruling* preempting Article 52 in part.

[65] *NPRM,* 84 Fed. Reg. 37,223, ¶ 32.

[66] Federal Communications Commission (FCC) Voice Nationwide Subscriptions, as of June 30, 2017. *See* https://www.fcc.gov/voice-telephone-services-report.

[67] See generally *AT & T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

[68] *See* 47 U.S.C. § 253; *Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 97-98 (1st Cir. 1999).

[69] *AT&T Corp.*, 525 U.S. at 405 (THOMAS, J., concurring in part, dissenting in part).

preempted state or local "statutes or regulations" that "may prohibit or have the effect of prohibiting" the provision of telecommunications services.

Both this Commission and the federal courts generally agree that the pertinent question under section 253(a) is "'whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[70] The Commission noted in the *Declaratory Ruling*: "The Commission has also interpreted section 253 of the Act to bar certain state and local laws and regulations that restrict providers' access to the right-of-way and other public infrastructure, including express and de facto moratoria on broadband deployment and certain restrictions on small cell wireless facilities deployment, because these state or local actions prohibit or have the effect of prohibiting the provision of telecommunications services."[71]

Under section 253(a), even a prohibitory requirement may not be preempted if it falls within one of two savings clauses. Section 253(b) preserves state authority to take competitively neutral actions necessary to "preserve and advance universal service," or "protect the public safety and welfare." Section 253(c) preserves state and local government authority to "manage the public rights-of-way" and require non-discriminatory "fair and reasonable compensation" for use of the rights-of-way. Nothing in this statutory language leaves room for the Commission to preempt state and local laws that merely regulate access to buildings.

The same can be said for section §332(c)(7). Section §332(c)(7), is entitled "Preservation of Local Zoning Authority," governs challenges to state and local decisions concerning the permitting of wireless facilities. Courts have universally held that, while §332(c)(7)(B) imposes "certain substantive and procedural limitations" on local

[70] *Puerto Rico Tel. Co.*, 450 F.3d at 18; *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) [both quoting *California Payphone Ass'n*, 12 F.C.C.R. 14191 (1997)].
[71] *MBC Declaratory Ruling*, 2019 WL 3065516, at *3, ¶ 6 (2019), citing, *Infrastructure Order,* 33 FCC Rcd at 9100-9101, ¶¶ 30-33.

authority, its purpose is "to preserve local land use authorities' legislative and adjudicative authority."[72] Once again, nothing in this statutory language leaves room for the Commission to preempt state and local laws that merely regulate access to buildings.

It is worth noting in this regard that, in the Commission's *Declaratory Ruling* the Commission refrained from preempting Article 52 to the extent it was consistent with other state and local mandatory access laws.[73] Importantly for this *NPRM*, the Commission did not rely on or even cite to sections 253 or 332(c)(7) as grounds for preempting San Francisco's ordinance to the extent it "imposes an in-use wire sharing requirement."[74] Rather, the Commission found that this requirement "contravenes federal policy, infringes on the Commission's regulation of cable inside wiring, and intrudes on the Commission's regulation of cable signal quality and technical standards."[75]

E. The Commission Cannot Rely on Section 253 to Impose Access Requirements at State and Local Government-Owned MTEs

Even if section 253 somehow applied to the broadband services in MTEs at issue here, the Commission could not use it as a springboard to impose any requirements on MTEs owned or controlled by state and local governments. Because local governments are acting in a proprietary capacity when owning and operating MTEs, federal preemption principles that underlie section 253 do not apply.[76] "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary

[72] *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013).
[73] *See MBC Declaratory Ruling,* 2019 WL 3065516, at *16-17, ¶¶ 42-44.
[74] *Id*. at *30, ¶ 86.
[75] *Id*.
[76] See *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 418-20 (2d Cir. 2002) ("Not all actions by state or local government entities ... constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace."). The Commission noted the distinction between local governments acting in a regulatory versus proprietary capacities when it considered the applicable time period to approve modifications of wireless facilities under the Spectrum Act. See *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* Report and Order, 29 FCC Rcd. 12865, 12964, ¶¶ 237-240 (2014).

interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."[77]

For this reason, section 253 does grant the Commission the lawful authority to restrict or prohibit any of the contractual provisions and/or non-contractual practices identified in this *NPRM* where a state or local government owns or controls the MTE. The limited scope of these preemption provisions, and well-settled law construing them, leave no room for doubt that they cannot service as a lawful basis for preempting local laws concerning access to MTEs.

III. CONCLUSION

For the foregoing reasons, San Francisco urges the Commission to continue to strengthen its rules that guarantee MTE residents a choice of communications providers, while allowing state and local governments to adopt and enforce their own pro-consumer choice laws. In these ways, the Commission will foster broadband deployment throughout the United States.

Dated: August 30, 2019

respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: /S/
WILLIAM K. SANDERS

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
Facsimile: (415) 554-4763
E-Mail: william.sanders@sfcityatty.org

[77] *Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I*, 507 U.S. 218, 231-32 (1993).